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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

STEVE GAVAZZA, Plaintiff and Appellant, v. LEE ANN AUSMAN, Defendant and Respondent.	E046838 (Super.Ct.No. SBFSS76600) OPINION

APPEAL from the Superior Court of San Bernardino County. Brian Saunders, Judge. Affirmed.

Steve Gavazza, in pro. per., for Plaintiff and Appellant.

Steven A. Becker for Defendant and Respondent.

Plaintiff Steve Gavazza (Father) appeals the denial of his motion to set aside the stipulated child support order of July 19, 2007. He challenges the court's order on the grounds of abuse of discretion and failure to issue a statement of decision. He further claims (1) the underlying child custody order is void on its face; (2) defendant and respondent Lee Ann Ausman (Mother) committed perjury in her order to show cause

filed on June 11, 2007; (3) the court abused its discretion in approving the child support stipulation dated July 19, 2007; and (4) the court erred in failing to perform a statewide uniform guideline calculation prior to approving the July 19, 2007, stipulation regarding child support.

I. PROCEDURAL BACKGROUND AND FACTS

Father and Mother have two children together. They entered into a stipulated child support order on July 19, 2007. The stipulation required that Father pay as follows: $750 per month, beginning on June 15, 2007; attorney fees in the amount of $75 per month, beginning September 1, 2007; and arrears in the amount of $1,125, to be paid in installments of $50 per month, beginning September 1, 2007.

On September 20, 2007, Father filed a motion for new trial, which was denied on October 24. Father responded by filing a peremptory challenge against Judge Sanders under Code of Civil Procedure section 170.6, which was denied on December 5. On January 2, 2008, Mother filed an order to show cause (OSC) and affidavit for contempt against Father. Father filed another peremptory challenge on February 1. On March 3, the peremptory challenge was denied as untimely. On April 17, Father pled not guilty to one count of contempt.

On June 27, 2008, Father filed a request to set aside the child support order on the grounds the order was the result of fraud and perjury, and it was void. A hearing was held on August 7, 2008. The court noted that Father was relying on Family Code section

4065[1] regarding "when a support order is below guideline support," and acknowledged that the section's procedural requirements may not have been met. The court observed that section 4065 was drafted "to make sure that a child would receive the appropriate amount of support." Specifically, the section acts as a guarantee that the support will not be less than the guideline amount unless there is a hearing and understanding as to why the lower amount was chosen. However, that section "is not meant to serve as a shield to block the payment of any ordered child support."[2] The court reviewed the paperwork submitted but chose not to entertain any argument. Then it denied the motion. Father informed the court of his intent to appeal and requested a statement of decision. The court denied the request as untimely.

Following the denial of Father's motion, the court held a hearing on the OSC regarding contempt. It found that Father was guilty of one count of contempt for failing to pay child support as required by the order.

II. DISCUSSION

Father contends the denial of his motion to set aside the support order was in error. Mother disagrees.

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[1] All further statutory references are to the Family Code unless otherwise indicated.

[2] The trial court viewed Father's use of section 4065 "as a sword to slash away the original order and obligation for paying support[]" since contempt charges had been brought against him for failure to pay child support.

A. Standard of Review

"The standard for appellate review of an order denying a motion to set aside . . . is quite limited. A ruling on such a motion rests within the sound discretion of the trial court, and will not be disturbed on appeal in the absence of a clear showing of abuse of discretion, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118, fn. omitted.)

B. Analysis According to Father, he moved to set aside the support order because his attorney coerced him into stipulating as to the amount of child support, the mandated form was not used, the required documentation (including the guideline formula) was absent, and section 4065 was violated. Section 4065, subdivision (a), in relevant part, provides: "Unless prohibited by applicable federal law, the parties may stipulate to a child support amount subject to approval of the court. However, the court shall not approve a stipulated agreement for child support below the guideline formula amount unless the parties declare all of the following: [¶] (1) They are fully informed of their rights concerning child support. [¶] (2) The order is being agreed to without coercion or duress. [¶] (3) The agreement is in the best interests of the children involved. [¶] (4) The needs of the children will be adequately met by the stipulated amount. [¶] (5) The right to support has not been assigned to the county pursuant to Section 11477 of the Welfare and Institutions Code and no public assistance application is pending."

Father references *In re Marriage of Hall* (2000) 81 Cal.App.4th 313 (*Hall*) to support his claim that section 4056 requires the court to make certain statements on the

record detailing its reasoning for differing from the guideline amount. In *Hall*, the trial court entered a child support order which required the father to pay a specific sum each month, plus eight percent of all earnings over and above the fixed sum, without regard to fluctuations in the mother's income. (*Id*. at pp. 315-316.) The appellate court reversed after finding that the order differed on its face from the formula guideline set forth in section 4055, and the court failed to make the requisite statement of justification for the deviation required by section 4056. (*Hall*, *supra*, at pp. 318-319.)

Here, unlike in *Hall*, this case comes before us following Father's request to set aside the child support order. That request was brought one year after the child support order was set. Had Father directly appealed from the child support order, *Hall* would have been on point. However, his delay in challenging the order resulted in an acceptance of it. Moreover, we note that typically, cases under section 4065 arise when the party receiving support finds the amount in the order to be inadequate or in error, or when the party paying has experienced a reduction in income. (See *Hall*, *supra*, 81 Cal.App.4th at p. 315; *Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445, 1448-1449.) Here, Father has not claimed that the amount he is paying to support his children is inadequate and should be reassessed. Instead, he merely claims that the "stipulated amount of support is an arbitrary amount not based on the actual income of the parties and a result of fraud, perjury, coercion, and duress." Again, we note that Father never appealed the support order. Rather, he waited for nearly one year and then brought a motion to set aside the order. Thus, the question for this court is whether the trial court abused its discretion in denying Father's motion to set aside the order. We conclude that it did not.

Father has failed at both the trial level and on appeal to provide sufficient evidence on which to evaluate the propriety of the child support order. Both parties suggest that it is below the guideline amount: Father, by the fact that he fails to claim that he is paying too much. And Mother, by her claim that they did actually "prepare a Guideline calculation, which came out slightly more than the stipulated amount." Thus, assuming that the support amount is less than the guideline amount, we are at a loss to understand why Father is challenging the amount he is paying. If he believes he is paying too little, he may voluntarily pay more!

Notwithstanding the above, since more than six months had elapsed from the time of the support order, section 3690 provides that a party may be relieved from a support order. (§ 3690, subd. (a).) However, the trial court must "find that the facts alleged as the grounds for relief materially affected the original order and that the moving party would materially benefit from the granting of the relief." (§ 3690, subd (b).) While Father has alleged the necessary grounds stated in section 3691, namely, actual fraud, perjury, and lack of notice, he has failed to establish how, if at all, he will materially benefit from the granting of his request. As to his stated grounds, they are time-barred. To claim fraud or perjury, Father had to bring his motion within six months after the date on which he discovered, or reasonably should have discovered, the fraud or perjury. (§ 3691, subds. (a), (b).) He neither brought his motion within six months, nor explained why he did not reasonably discover the fraud or perjury until a later date.

Even if we were to consider his claim of perjury, we reject it. Father claims that Mother perjured herself when she stated that she had sole custody of the children

pursuant to the court's order of April 10, 2007. Although a copy of the transcript from the April 10, 2007, hearing was not provided in this record, we note that it was provided in Father's previous appeal, case No. E046749. In that case, Father filed a petition for writ of habeas corpus in which he claimed that the court exceeded its jurisdiction in convicting him of contempt. On our own motion, we take judicial notice of our record in case No. E046749, which contains documents, including the reporter's transcript of the hearing on April 10, 2007, filed in the underlying family law case. (Evid. Code, §§ 452, subd. (d), 459.) According to the reporter's transcript, on April 10, 2007, the trial court stated: "The mother shall have sole physical custody." Thus, Mother did not commit perjury.

Regarding fraud, Father claims that his own counsel, Valerie Ross, committed fraud by coercing him to sign the stipulation for child support. However, under section 3691, subdivision (a), a party is defrauded when he or she is "kept in ignorance or in some other manner, other than his or her own lack of care or attention, was fraudulently prevented from fully participating in the proceeding." While Father claims that Ross "sold [his] interest to opposing party[,]" the record shows otherwise. Father participated in the proceedings, as demonstrated by his signature on the stipulation, by the fact that he has been represented by many different attorneys, and by the fact that he has filed many motions and appeals. If any of his interest was "sold," it was done so at a discounted rate below the guideline amount. Because neither of Father's claims of perjury or fraud has been proven, the trial court was within its discretion to deny the motion based on these

grounds. Moreover, Father is hard-pressed to claim lack of notice given the fact that he signed the stipulation.

At no time has Father requested that the support order be adjusted to the guideline amount. Rather, he wants the order to be vacated in its entirety. We agree with the trial court's assessments and concerns. Given the fact that Father has failed to pay child support at the below-guideline amount, resulting in his conviction for contempt, and the fact that he was not seeking to have the support set at the guideline amount, it appears that Father is using section 4065 "as a shield to block the payment of any ordered child support." If Father is truly concerned that the support order will not adequately allow him to financially support his children, he can request the trial court to modify the order to the guideline amount, or opt to pay more voluntarily. However, since the trial court was in accord with sections 3690 and 3691 regarding relief from child support orders, and the decision to deny the motion to reconsider cannot reasonably amount to a manifest miscarriage of justice for Father, we conclude the trial court did not abuse its discretion in denying Father's motion. Given our conclusion, we do not reach Father's numerous other assertions embedded within this appeal, most of which are difficult to discern.

C. Statement of Decision

Father contends the trial court committed reversible error by failing to issue a statement of decision. We disagree. Section 3654 provides: "At the request of either party, an order modifying, terminating, or setting aside a support order shall include a statement of decision." The trial court's failure to render a statement of decision amounts to reversible error. (*In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010.)

However, when a party remains silent at the hearing and fails to bring the issue to the trial court's attention, he or she waives the right to a statement. (*Id.* at p. 1011.) Here, Father never requested a statement of decision until after the court had moved on to the issue of contempt, and in response to another party raising the issue of a statement of decision. Having failed to make a timely request, Father has waived the issue on appeal. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647.) Moreover, we note that the trial court's order did not modify, terminate, or set aside a support order. Instead, it merely denied Father's request that the support order be set aside.

III. DISPOSITION

The order denying Father's motion to set aside the child support order of July 19, 2007 is affirmed. Costs on appeal are awarded to Mother.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.